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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/753,519	01/08/2004	Randall Lane Grimm	ROC920030317US1	9852

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EXAMINER	
CARDENAS NAVIA, JAIME F	
ART UNIT	PAPER NUMBER
3624	

MAIL DATE	DELIVERY MODE
03/01/2010	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/753,519	GRIMM ET AL.	
	Examiner	Art Unit	
	Jaime Cardenas-Navia	3624	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *14 October 2009*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *23* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *23* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Introduction

1. This **FINAL** office action is in response to communications received on October 14, 2009. Claim 23 has been amended. Claims 7-12 have been cancelled. No new claims have been added. Claim 23 is currently pending.

Response to Amendment

2. Applicant's amendments to the claims are **sufficient to overcome the 35 U.S.C. § 101 rejections** set forth in the previous office action.

Response to Arguments

3. Applicant's arguments have been fully considered by the Examiner. In particular, Applicant argues that:

(A) Eng does not teach or suggest providing metered capacity of a plurality of processors on demand;

(B) Eng does not teach or suggest expiring all time-out usage windows for all of the plurality of processors;

(C) Eng does not teach or suggest selecting one of the plurality of processors;

(D) Eng does not teach or suggest unbilled processors;

(E) Eng does not teach or suggest assigning unused billed capacity assigned to one of the other of the plurality of processors to the selected processor; and

(F) Eng does not teach or suggest when there is no unbilled capacity assigned to any of the other of the plurality of processors, billing a predetermined resource-time for the selected processor.

Regarding argument (A), Examiner respectfully disagrees. First, Examiner would like to note that though Eng is directed to managing software license usage rather than processor usage, the algorithms of Eng could easily be applied to managing many types of resources (as suggested by Eng, par. 37), including processors. This is applicable to all arguments, and reflected in the rejection. Second, Examiner notes that the recitation of "providing metered capacity of a plurality of processors on demand" is merely in the preamble of the claims, and a preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps of structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976) and *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951). Since the preamble of "providing metered capacity of a plurality of processors on demand" serves the sole purpose of establishing an intended use of the invention, it is therefore not granted patentable weight.

Regarding argument (B), Examiner respectfully disagrees. Eng teaches a scan which identifies failed nodes and frees up the license associated with the failed license (description of this process begins in par. 52, par. 60 states "this effectively deallocates any software licenses formerly required by any previously counted users at nodes that have since failed"). These scans can be performed at predetermined time intervals, conditions, or manually (par. 53). Failed nodes are equivalent to timed-out usage windows.

Regarding argument (C), Examiner respectfully disagrees. Whereas software license usage equates to processor usage, nodes equate to processors, because nodes are where software licenses are used. Using this interpretation, scanning nodes equates to iteratively selecting processors. As mentioned above, par. 52 of Eng begins the description of a scan, which selects all the nodes.

Regarding argument (D), Examiner respectfully disagrees. Eng teaches identifying unbilled nodes (par. 61-65, too many licenses have been allocated, which is identified by the system).

Regarding argument (E), Examiner respectfully disagrees. The scan of Eng identifies failed nodes, which are tying up billed capacity (software licenses), and deallocates this billed capacity (software licenses) so that new and existing nodes can use the billed capacity (par. 60). In the case of too many licenses having been allocated (unbilled resources), the deallocated software licenses from failed nodes (unused billed capacity) become assigned to unbilled nodes (unbilled resources). See par. 61-65 for overallocation of software licenses.

Regarding argument (F), Examiner respectfully disagrees. The purchase of an additional software license *is* billing a predetermined resource-time for the selected resource. Software licenses are resources that are purchased for a predetermined time period to be used at a node.

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

5. **Claim 23 is rejected** under 35 U.S.C. 103(a) as being unpatentable over Eng (US 2002/0169725 A1).

Regarding claim 23, Eng teaches a computer-implemented method for providing metered capacity of a plurality of processors on demand in a computer system (abstract), the method comprising the steps of:

providing the plurality of processors in the computer system, the computer system performing the steps of:

(A) determining total resource usage of the plurality of resources in the computer system across a plurality of logical partitions (par. 11, "realtime determination of a number of software licenses allocated to software users at a plurality of nodes", par. 12, par. 52-60);

(B) determining base resource usage of the plurality of resources in the computer system across a plurality of logical partitions (par. 12, 61, license allocation condition is when usage exceeds capacity);

(C) when the total resource usage determined in step (A) exceeds the base resource usage determined in step (B) (par. 12, 61, license allocation condition is met), performing the steps of:

expiring all timed-out usage windows for all of the plurality of resources (par. 11, 12, 60, identifying and deallocating resources to failed nodes);

selecting one of the plurality of resources (par. 52-60, node scan);

when the selected resource is unbilled, determining whether there is unused billed capacity assigned to one of the other of the plurality of resources (par. 60, identifying and freeing up resources not in use);

when there is unused billed capacity assigned to one of the other of the plurality of resources, assigned the unused billed capacity assigned to the one of the other of the plurality of resources to the selected resource (par. 60, identifying and freeing up resources not in use, par. 61-65, overallocation of licenses); and

when there is no unbilled capacity assigned to any of the other of the plurality of resources, billing a predetermined resource-time for the selected resource (par. 66, grace period allows administrator to purchase additional software licenses, which is billing a predetermined resource-time).

Eng does not explicitly teach wherein the resource is a processor.

Official notice is given that monitoring and managing processor usage was old and well-known to one of ordinary skill in the art at the time of the invention.

All the claimed elements were known in the prior art and one skilled in the art could have combined the elements as claimed by known methods with no change in their respective functions. The claimed invention is merely a combination of old and well-known elements, and the combination would have yielded predictable results to one of ordinary skill in the art at the time of the invention as the algorithms used for monitoring resources work independently of what the actual resource is. Thus, it would have been obvious to combine the teachings, motivated by the need to monitor processor resources rather than software resources.

Conclusion

6. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jaime Cardenas-Navia whose telephone number is (571)270-1525. The examiner can normally be reached on Mon-Fri, 10:30AM - 7:00PM EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kambiz Abdi can be reached on (571) 272-6702. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Thomas Dixon/ February 25, 2010
Primary Examiner, Art Unit 3684

/J. C./
Examiner, Art Unit 3624